

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

March 8, 2007

Catherine D. Clarke, Director
Education and Regulatory Advocacy
American Speech and Hearing Association
44 North Capitol Street, NW
Suite 715
Washington, DC 20001

Dear Ms. Clarke:

This is in response to your letter of November 2, 2006 in which you request guidance and/or clarification of the final Part B regulations, implementing the Individuals with Disabilities Education Act (IDEA), as amended by the IDEA Improvement Act of 2004. I apologize for the delay in responding.

First, you request clarification that the policy on when a speech or language impairment "adversely affects educational performance" as described in a May 30, 1980 letter from the Department of Health, Education and Welfare to Dublinske remains the policy of the U.S. Department of Education, Office of Special Education Programs (OSEP). Under 34 CFR §300.8(c)(11), "speech or language impairment means a communication disorder, such as stuttering, impaired articulation, a language impairment, or a voice impairment, that adversely affects a child's educational performance." It remains the Department's position that the term "educational performance" as used in the IDEA and its implementing regulations is not limited to academic performance. Whether a speech and language impairment adversely affects a child's educational performance must be determined on a case-by-case basis, depending on the unique needs of a particular child and not based only on discrepancies in age or grade performance in academic subject areas. Section 614(b)(2)(A) of IDEA and the final regulations at 34 CFR §300.304(b) state that in conducting an evaluation, the public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. Therefore, IDEA and the regulations clearly establish that the determination about whether a child is a child with a disability is not limited to information about the child's academic performance. Furthermore, 34 CFR §300.101(c) states that each State must ensure that a free appropriate public education (FAPE) is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

It is important to note that under 34 CFR §300.8, a child must meet a two-prong test to be considered a child with a disability: (1) have one of the specified impairments (disabilities); and (2) because of the impairment, need special education and related services. If a child has one of the impairments, but needs only related services and does not need special education, the child is not a child with a disability (see 34 CFR §300.8(a)(2)(i)). However, 34 CFR §300.8(a)(2)(ii) provides that if, consistent with 34 CFR §300.39(a)(2), the related services required by the child, are considered special education rather than a related service under State standards, the child would be considered to be a child with a disability.

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Second, you requested written guidance on the need to use substitutes and to schedule make-up sessions when speech-language pathology sessions are missed due to a child's absence from school, cancellation for a class or school activity, or absence of the speech language pathologist. IDEA and the regulations do not address these issues. States and local educational agencies (LEAs) are required to ensure that all children with disabilities have available to them FAPE, consistent with the child's individualized education program (IEP) (see 34 CFR §300.101). We encourage public agencies to consider the impact of a provider's absence or a child's absence on the child's progress and performance and determine how to ensure the continued provision of FAPE in order for the child to continue to progress and meet the annual goals in his or her IEP. Whether an interruption in services constitutes a

denial of FAPE is an individual determination that must be made on a case-by-case basis.

Finally, you request clarification regarding the continuum of service delivery options to be considered for a student. As you correctly point out, the final regulations do not address service delivery options but, instead, address the continuum of alternative placements. However, the Analysis of Comments and Changes section in the final regulations states, "it would be inconsistent with IDEA to dictate the amount and location of services for all children receiving speech-language pathology services. As with all related services, the child's IEP Team is responsible for determining the services that are needed for the child to receive FAPE. This includes determining the type of related service, as well as the amount and location of services." 71 Fed. Reg. 46575 (Aug. 14, 2006). The IEP Team is responsible for developing a child's IEP in accordance with 34 CFR §§300.320 through 300.324. This includes, among other things, determining the anticipated frequency, location, and duration of the services (see 34 CFR §300.320(a)(7)); an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class (34 CFR §300.320(a)(5)); a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child; and a statement of the program modifications or supports for school personnel that will be provided (see 34 CFR §300.320(a)(4)). The examples you provided in your letter (e.g., small-group instruction or direct services) are matters for consideration by the IEP Team, based on a child's individual and unique needs, and cannot be made as a matter of general policy by administrators, teachers or others apart from the IEP Team process.

Based on section 607(e) of the IDEA, we are informing you that our response is provided as informal guidance and is not legally binding, but represents an interpretation by the U.S. Department of Education of the IDEA in the context of the specific facts presented.

We hope you find this information responsive to your requests. Please do not hesitate to contact me if you have further questions or if I can be of any further assistance.

Sincerely,

/s/

Alexa Posny, Ph.D.

Director

Office of Special Education Programs